No. D
Supreme Court, U.S.
FILED
09-212 JUN 15 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ROBERT H. LENHAM,

Petitioner,

v.

DISABLED AMERICAN VETERANS,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeals
Of The State Of New Mexico

PETITION FOR A WRIT OF CERTIORARI

ROBERT H. LENHAM, Pro Se
P.O. Box 278
Whitehouse, Texas 75791
(903) 839-8948

QUESTIONS PRESENTED

Judge Michael E. Vigil of the Court of Appeals of the State of New Mexico refused to recuse himself from a whistleblower lawsuit appeal in which four members involved in the case (in opposition to plaintiff), are Judge Vigil's Judicial Campaign Committee Members, responsible for the solicitation of funds/ support that successfully placed him in the position of presiding over this case. The question presented is whether Judge Michael Vigil's failure to recuse himself from participation in a case involving multiple Members of his Judicial Campaign Committee violated the Due Process Clause of the Fourteenth Amendment.

Judge Carol Vigil of the First District Court of the State of New Mexico failed to recuse herself from a whistleblower lawsuit in which she stated (and was quoted by the Associated Press) that her basis for determining that I was not the truthful party when my testimony contradicted that of an attorney's was because she was an attorney and attorneys have a bond. The question presented is whether Judge Carol Vigil's failure to recuse herself from participation in a case wherein she openly states she is bias "towards attorneys" violated the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

In addition to the party named in the caption, Mr. Charles Joeckel entered the case as the Third Party Defendant/Counter-Claimant. He is now deceased. Oklahoma Attorney Gary Richardson and New Mexico-licensed attorney Tim Butler (for Pro Hac Vice admission by Richardson) joined in as the first Interested Party. Iowa Attorney John Loeschen and New Mexico-licensed attorney J. Ed Hollington (for Pro Hac Vice admission by Loeschen) joined in as the second Interested Party.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT	2
REASONS FOR GRANTING THE PETITION	7
I. JUDGE MICHAEL VIGIL'S REFUSAL TO RECUSE HIMSELF CONFLICTS WITH THE COURT'S DUE PROCESS PRECEDENT	7
II. JUDGE MICHAEL VIGIL'S REFUSAL TO RECUSE HIMSELF ADDS TO THE SPLIT OF AUTHORITY AN EXISTING CONFLICT AMONG THE LOWER COURTS REGARDING THE CIRCUMSTANCES IN WHICH RECUSAL IS CONSTITUTIONALLY REQUIRED	11
III. JUDGE CAROL VIGIL'S STATED (AND QUOTED NATIONALLY BY THE ASSOCIATED PRESS) BIAS "TOWARDS" ATTORNEYS AND "AGAINST" NON-ATTORNEYS WHEN FACED WITH CONTRADICTORY TESTIMONY GREATLY THREATENS PUBLIC CONFIDENCE IN JUDICIAL NEUTRALITY	14

TABLE OF CONTENTS – Continued

Page

IV. THE UNDERLYING CASE IS EXCEPTIONALLY IMPORTANT TO THE PUBLIC IN THAT IT IS A WHISTLEBLOWER LAWSUIT THAT PROMISES TO EXPOSE THE MISAPPROPRIATION OF PUBLIC DONATIONS BY A NON-PROFIT CONGRESSIONALLY-CHARTERED VETERANS ORGANIZATION. THIS COURT'S REVIEW WILL PREVENT "JUDICIAL BIAS" FROM DEFEATING A VETERAN'S 13-YEAR BATTLE TO HAVE HIS CASE HEARD BY A JURY IN AN EFFORT TO PUT AN END TO THE CORRUPTION 15

CONCLUSION 16

Decision of the Court of Appeals of the State of New Mexico (Sept. 23, 2008) ..... App. 1

Memorandum Opinion of Court of Appeals of the State of New Mexico (April 05, 2004) (remand) ..... App. 19

Order (annotated on Motion) of the Court of Appeals of the State of New Mexico regarding recusal of Judge Michael Vigil (Oct. 8, 2008) ..... App. 44

Order of the Court of Appeals of the State of New Mexico regarding recusal of Judge Michael Vigil (and vacate his Proposed Summary Disposition) (Oct. 29, 2007) ..... App. 53

TABLE OF CONTENTS – Continued

Page

Order of the First District Court of the State of New Mexico on attorney's fees and dismissal of case with prejudice (Aug. 16, 2006).....App. 55

Order and Judgment of the First District Court of the State of New Mexico for defendant DAV on the court's award of sanctions against plaintiff Robert H. Lenham (Sept. 21, 2005).....App. 58

TABLE OF AUTHORITIES

Page

CASES

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) 13

Allen v. Rutledge, 139 S.W.3d 491 (Ark. 2003) 11

Caperton v. A. T. Massey Coal Co., ___ U.S. ___ (2009) 7, 8, 10, 14

Commonwealth v. Brandenburg, 114 S.W.3d 830 (Ky. 2003) 11

Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145 (1968) 2, 8

Johnson v. Mississippi, 403 U.S. 212 (1971) (per curiam) 11

MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332 (Fla. 1990) 13

Mayberry v. Pennsylvania, 400 U.S. 455 (1971) 9

Mistretta v. United States, 488 U.S. 361 (1989) 2

In re Murchison, 349 U.S. 133 (1955) 9, 13

Peters v. Kiff, 407 U.S. 493 (1972) 8

Pierce v. Pierce, 39 P.3d 791 (Okla. 2001) 8, 12, 13, 14

Republican Party v. While, 536 U.S. 765 (2002) 10

State v. Brown, 776 P.2d 1182 (Haw. 1989) 12

Tumey v. Ohio, 273 U.S. 510 (1927) 11

Ward v. Vill. of Monroeville, 409 U.S. 57 (1972) 7

Withrow v. Larkin, 421 U.S. 35 (1975) 9

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

National Center For State Courts 8

PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert H. Lenham, Pro Se, respectfully submits his petition for a writ of certiorari to review the judgment of the Court of Appeals of the State of New Mexico.

OPINIONS BELOW

I am not aware of any of the opinions below being published.

JURISDICTION

The Supreme Court of the State of New Mexico entered judgment on January 15, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. XIV, § 1.

STATEMENT

This court has emphasized that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968). This case affords the Court the opportunity to clarify the circumstances in which a party or the party's lawyer is the judge's Judicial Campaign Committee Member, creating an "appearance of bias" that is so significant that due process requires the recusal of the judge who benefited from the parties' efforts on his/her behalf.

This case involves four members of Judge Michael Vigil's Judicial Campaign Committee making this issue vitally important to preserving the "reputation for impartiality and nonpartisanship" – and, ultimately, the "legitimacy" – "of the Judicial Branch." *Mistretta v. United States*, 488 U.S. 361, 407 (1989). The Defendant DAV retained the law firm of Madison, Harbour, Brennan and Mroz which employs three of Judge Michael Vigil's Judicial Campaign Committee Members. The fourth individual who is Judge Michael Vigil's Judicial Campaign Committee Member is my former attorney, Ed Hollington (who is testifying against me and on behalf of the DAV, claiming that I agreed to settle then reneged which I unequivocably deny).

The underlying case is a whistleblower lawsuit which I filed against my former employer of 23 years, the Disabled American Veterans (DAV) when I was

fired for reporting the misappropriation of hundreds of thousands of dollars donated by the public and numerous other improprieties to the Senate Chairman of the Veterans Affairs Committee, Senator Alan Simpson. During trial preparation, depositions revealed that the Senator's Chief Staff Aide (unbeknownst to Senator Simpson) was the "snitch" who asked my immediate boss, Mr. Butch Joeckel, to meet him for lunch at Duke Ziebert's restaurant in Washington, D.C. to discuss my meeting with the Senator and the Aide's future with the DAV. The record includes DAV accounting records that the Aide became a highly paid consultant for the DAV and received a check for $60,000.00 soon after the Duke Ziebert's meeting.

In July 1996 I hired a local New Mexico attorney Tim Butler, on an hourly basis, to begin the lawsuit. The Associated Press printed the story of the lawsuit, which was read by Oklahoma Attorney Gary Richardson who called me and offered to take the case to trial. He and Butler entered into a contract since Richardson was not licensed in New Mexico.

I hired Richardson on a contingency basis and pre-trial work began. He insisted I hire his friend, Fred Minton, a jury trial consultant. Two weeks or so before the jury selection my attorney, Gary Richardson, called and stated I must settle the case. He threatened to quit, became vulgar and demeaning when I would not agree to settle. I had made it perfectly clear to him that my intent was to go to trial. He quit the case and placed a lien on the settlement I

didn't agree to. I had paid Richardson more than $30,000 towards expenses he refused to explain. He refuses to release my files which include vital evidence including video depositions and a television network interview.

The jury selector, Fred Minton, insisting that my case was excellent and that Richardson has "problems" recommended Iowa Attorney Loeschen take the case to trial. I hired him along with New Mexico attorney Hollington for Loeschen's Pro Hac Vice requisite. Loeschen, the record supports, contacted the DAV attorneys in June of 2000 to ask the DAV if they would put the previous offer (300K) back on the table. I did not hire Loeschen until late Sept. 2000 and did not know he was negotiating the case "behind my back." When I refused to settle, Loeschen joined forces with the DAV and testified against me stating I reneged. The DAV motioned the trial court to enforce settlement and Judge Carol Vigil agreed.

When I appealed to the Court of Appeals of the State of New Mexico, the case was remanded for new findings of fact, and asked the court to investigate several of the attorneys involved for breach of fiduciary duty, misleading the trial court and other admonishments.

The case was reconsidered by Judge Carol Vigil who re-ruled the same (except reversing her decision to enforce Richardson's forum selection clause). She accepted the 72 findings and conclusions submitted mostly by the DAV attorneys with the exception of

approximately 8 by the other attorneys. Judge Carol Vigil resigned (or retired) soon thereafter and my case was assigned to First District Court of New Mexico Judge Daniel Sanchez.

The case was re-appealed by my appellate attorney Joe Kennedy who quit the case when it was assigned to Judge Michael Vigil of the Court of Appeals who wrote the Proposed Summary Disposition. We had had a good report and I couldn't understand why he would quit without reason. I later learned that Joe Kennedy is a Member of Judge Michael Vigil's Judicial Campaign Committee, and it is my belief that he did not want to get involved with the conflict of interest.

While seeking an appellate attorney to continue my second appeal, I learned that my case had been sealed without my knowledge and each attorney I spoke to said if I could get the case unsealed they would review the merits in consideration of representing me. Motion to unseal was denied. Aware of the situation, a reporter from the Albuquerque Journal went to Judge Sanchez and asked about the Constitutionality of denying me access to my case. The reporter called me when he returned from Judge Sanchez's office and said there was a message waiting on his voicemail from Judge Sanchez stating he sealed the file in error and would unseal it immediately. It still took several weeks for me to access my case due to computer problems at the courthouse.

I filed a Memorandum in Opposition and my appeal was assigned to the Expedited Bench (General Calendar). Motion to recuse Judge Michael Vigil was again denied and, after an Oral Hearing before him and 2 other appellate judges, his Proposed Summary Disposition was affirmed. Petition for Writ of Certiorari as well as Motion for Reconsideration was denied by the New Mexico Supreme Court.

This Court's review of Judge Michael Vigil's insistence on participating in this case is warranted to provide authoritative guidance to the lower courts regarding the circumstances in which due process requires recusal of a judge who has benefited from a party or a party's attorney who raised funds on behalf of the judge's election as well as to restore public confidence in the judicial systems of the thirty-nine States that elect their judges. Since Judge Michael Vigil received the case when it was remanded for new findings of fact and conclusions of law as well as fiduciary concerns, a reasonable person would expect to find new findings and conclusions in support of the new ruling by Judge Carol Vigil. This, however, was not the case. The evidence or lack thereof, i.e., attorney fees, attorney expenses, presentment of a settlement agreement that did not exist (therefore could not be "ratified") remained the same and unsupported by the Court of Appeals opinion (written by Judge Michael Vigil) which simply twisted the rationale to conform to the arguments of counsel and Judge Carol Vigil's rulings.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to clarify the circumstances in which due process requires the recusal of an elected judge in which his own Judicial Campaign Committee Members are parties or lawyers in a case. This issue was included in the recent case of *Caperton v. A.T. Massey Coal Co.*, ___ U.S. ___ (2009) and parallels the same profound ramifications for the Due Process Clause's guarantee of judicial impartiality. In actuality, clarification of this particular issue is necessary as it is the "other side of the coin" of Judicial Campaign bias that has the potential of compromising the public's confidence in this great country's judicial system.

I. JUDGE MICHAEL VIGIL'S REFUSAL TO RECUSE HIMSELF CONFLICTS WITH THE COURT'S DUE PROCESS PRECEDENT.

This Court has emphasized that a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). A "neutral and detached judge" is an essential component of this due process requirement. *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972). Indeed, "even if there is no showing of actual bias" on the part of a judge, "due process is denied by circumstances that create the likelihood or the appearance of bias" because such a *possibility* of judicial impropriety creates a constitutionally unacceptable risk of *actual* impropriety.

Peters v. Kiff, 407 U.S. 493, 502 (1972). *Caperton v. Massey*, (2009).

Judge Michael Vigil's refusal to recuse himself from this case is in direct opposition to the National Center for State Court's directive which states " . . . *but the judge is disqualified when the judge's Campaign Coordinator or a Campaign Committee Member is a party or lawyer. . . .*" His refusal to recuse himself is in opposition to this Court's requirement that a judge "must avoid even the *appearance* of bias." *Commonwealth Coating Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (emphasis added).

Although in *Caperton v. Massey*, the amount of funds donated were at issue, the amount of money given to Judge Michael Vigil's election campaign due to these committee members' efforts, individually, cannot be easily determined, if at all, further emphasizing the need for review/clarification by this Court.

Judge Vigil's insistence on participating in this case therefore conflicts with this Court's decisions specifying the circumstances in which due process requires recusal. It also deepens a three-way division among the lower courts regarding the due process standard governing recusal determinations and is squarely at odds with a decision of the Supreme Court of Oklahoma holding that federal due process requires recusal whenever a judge receives substantial campaign contributions from a party or attorney who also solicited donations from other campaign supporters. *Pierce v. Pierce*, 39 P.3d 791, 799 (Okla. 2001). *Caperton v. Massey* (2009).

This case affords the Court an ideal opportunity both to clarify the circumstances in which due process mandates recusal and to restore the public's waning confidence in state judicial systems in the face of the increasingly significant role of campaign committees in state judicial elections.

"[O]ur system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136. This "stringent rule," the Court has explained, "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way justice must satisfy the appearance of justice." *Id.* (internal quotation marks omitted). of the contempt proceedings. *Id.* at 137.

Similarly, in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), the Court held that a judge who had been subjected to repeated verbal abuse by a criminal defendant could not preside over the defendant's criminal contempt proceedings. *Id.* at 466. Despite the absence of evidence of actual bias on the part of the judge, the Court concluded that recusal was required because "[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." *Id.* at 465; *see also Withrow v. Larkin*, 421 U.S. 35, 47 (1975) ("experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable" in cases in which the judge "has been the target of personal abuse or criticism from the party before him").

Caperton v. Massey, (2009). Since I had submitted motions requesting Judge Michael Vigil to recuse himself which questioned his impartiality, I would feel confident that Judge Michael Vigil would have a negative "attitude" towards me.

Indeed, just as is human nature for a judge to be biased *against* a criminal defendant whom he has charged with committing contempt or by whom he has been verbally abused, it is equally a part of human nature for a judge to be biased *in favor* of a party whose Campaign Committee members facilitated his election to the bench. *See Republican Party v. While*, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring) ("relying on campaign donations may leave judges feeling indebted to certain parties or interest groups").

Similarly, just as a judge operates under a constitutionally unacceptable "temptation" to decide a case in a manner that furthers his own interests where he is pursuing a lawsuit raising issues identical to the case pending before him, such a "temptation" is equally acute where the judge is beholden to members of his Campaign Committee for the majority of the funds expended in support of his recent campaign for office – and where casting an outcome-determinative vote against any of his Campaign Committee lawyers may foreclose the possibility of

similar financial support when the judge seeks re-election.[1]

II. JUDGE MICHAEL VIGIL'S REFUSAL TO RECUSE HIMSELF ADDS TO THE SPLIT OF AUTHORITY AN EXISTING CONFLICT AMONG THE LOWER COURTS REGARDING THE CIRCUMSTANCES IN WHICH RECUSAL IS CONSTITUTIONALLY REQUIRED.

Although this Court has repeatedly recognized that "[t]rial before 'an unbiased judge' is essential to due process" (*Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (per curiam)), lower courts have reached conflicting conclusions regarding the federal constitutional standard governing recusal determinations – a conflict that extends to the campaign contribution setting implicated in this case. *See also Allen v. Rutledge*, 139 S.W.3d 491, 498 (Ark. 2003) ("Due process requires not only that a judge be fair, but that he also appear to be fair.") (citation omitted); *Commonwealth v. Brandenburg*, 114 S.W.3d 830, 834 (Ky. 2003) ("there need not be an actual claim of bias or impropriety levied, but the mere appearance that

---

[1] This Court has held that it "violates the Fourteenth Amendment . . . to subject [a defendant's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

such an impropriety might exist is enough to implicate due process concerns"); *State v. Brown*, 776 P.2d 1182, 1188 (Haw. 1989) (due process requires that justice "'satisfy the appearance of justice'"). *Caperton v. Massey*,' (2009)

The New Mexico Court of Appeals' decision determining the motion for recusal of Judge Michael Vigil to be "moot" was based upon the fact that he was one of a panel of three judges. However, in this Court's review of *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), Justice Brennan stated:

> And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the Court's ultimate disposition. The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.

It also directly conflicts with a decision in which the Supreme Court of Oklahoma – siding with those courts that have deemed an appearance of impropriety sufficient to require recusal – held that federal due process requires recusal whenever a judge receives substantial campaign contributions from a party or attorney who also solicited donations from other campaign supporters. *See Pierce v. Pierce*, 39

P.3d 791, 799 (Okla. 2001); *see also MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1337 n.4 (Fla. 1990) ("There may very well come a point where a political contribution is substantial enough that it would create a well-founded fear of bias or prejudice.").

In *Pierce*, the Supreme Court of Oklahoma held that it violated federal due process for a judge to preside over divorce proceedings where an attorney for one of the parties had donated $5,000 to the judge's reelection campaign and solicited other contributions on the judge's behalf while the case was pending. 39 P.3d at 799. The court explained that "the reach of due process jurisprudence requires not only a fair tribunal, but also the *appearance* of a fair tribunal." *Id.* at 798 (citing *Murchison*, 349 U.S. at 136) (emphasis in original). Applying the due process principles articulated by this Court in *Murchison*, *Lavoie*, and other cases, the Oklahoma court "conclude[d] that due process must include the right to a trial without the *appearance* of judge partiality arising from counsel's campaign contributions and solicitation of campaign contributions on behalf of a judge during a case pending before that judge." *Id.* at 799 (emphasis in original).

Because "the appearance of justice is often as important as the proper administration of justice," the Oklahoma court further held that "[c]ampaign contributions and solicitation of contributions of funds for judges by lawyers appearing before those judges in such amounts as to give off an appearance

of partiality is not the type of error to which [it] will apply a harmless error standard." *Pierce*, 39 P.3d at 800. The court therefore disqualified the trial judge from further proceedings in the case. *Id.*

In light of these divergent understandings of federal due process, this Court should grant review to provide the lower courts with authoritative guidance regarding the recusal standard mandated by the Due Process Clause and the circumstances in which that standard requires the recusal of a judge who has benefited from a litigant's campaign expenditures and fundraising efforts. *Caperton v. Massey*, (2009).

III. JUDGE CAROL VIGIL'S STATED (AND QUOTED NATIONALLY BY THE ASSOCIATED PRESS) BIAS "TOWARDS" ATTORNEYS AND "AGAINST" NON-ATTORNEYS WHEN FACED WITH CONTRADICTORY TESTIMONY GREATLY THREATENS PUBLIC CONFIDENCE IN JUDICIAL NEUTRALITY.

In her oral ruling which began appeal process of this case, Judge Carol Vigil of the First District Court of New Mexico indicated bias towards attorneys and against non-attorneys when she made the following statement at the end of the oral hearing:

> **. . . and you know, we attorneys, really don't have a lot of things except our credibility, and if we don't have our credibility, we don't really – we don't**

> **have anything. An attorney's word is his or her bond, comes to mind. . . .**

Judge Carol Vigil's stated bias is, as with Judge Michael Vigil, in violation of this Court's Due Process Precedent. Each argument in support of Judge Michael Vigil's inability to be impartial, (for the sake of time) is applied to Judge Carol Vigil due to the above stated rationale to rule against me.

IV. THE UNDERLYING CASE IS EXCEPTIONALLY IMPORTANT TO THE PUBLIC IN THAT IT IS A WHISTLEBLOWER LAWSUIT THAT PROMISES TO EXPOSE THE MISAPPROPRIATION OF PUBLIC DONATIONS BY A NON-PROFIT CONGRESSIONALLY-CHARTERED VETERANS ORGANIZATION. THIS COURT'S REVIEW WILL PREVENT "JUDICIAL BIAS" FROM DEFEATING A VETERAN'S 13-YEAR BATTLE TO HAVE HIS CASE HEARD BY A JURY IN AN EFFORT TO PUT AN END TO THE CORRUPTION.

I have been asked through the years why I have continued in my efforts to expose the DAV in the courts for thirteen years. The reason is because our military veterans and forefathers have fought and died to provide me this opportunity to be heard by the highest court in the land and I am grateful for this opportunity.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT H. LENHAM, Pro Se
P.O. Box 278
Whitehouse, TX 75791
(903) 839-8948

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ROBERT H. LENHAM,

Plaintiff-Appellant,

v. **NO. 27,087**

DISABLED AMERICAN VETERANS,

Defendant-Appellee,

v.

J. EDWARD HOLLINGTON & JOHN L. LOESCHEN,

Interested Parties,

and

TIMOTHY L. BUTLER & GARY L. RICHARDSON, RICHARDSON LAW FIRM, P.C.,

Interested Parties.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Carol J. Vigil and Daniel Sanchez, District Judges

Robert Lenham
Whitehouse, TX

Pro Se Appellant

Madison, Harbour & Mroz, P.A.
William C. Madison
Michael J. Dekleva
Jacqueline Olexy
Albuquerque, NM

for Appellee

Timothy L. Butler
Santa Fe, NM

for Interested Parties Butler & Richardson

J. Edward Hollington & Associates, P.A.
J. Edward Hollington
Albuquerque, NM

for Interested Parties Hollington & Loeschen

DECISION

(Filed Sept. 23, 2008)

PICKARD, Judge

Robert Lenham appeals from the district court's findings and conclusions in his wrongful termination suit against Disabled American Veterans (DAV). He appeals the district court's enforcement of his settlement agreement with DAV, the assessment of attorney fees and costs against him and in favor of DAV, the enforcement of a charging lien filed by his former attorneys, and several miscellaneous issues. We affirm.

BACKGROUND

Lenham brought a five-count complaint on July 3, 1996, against DAV following termination of his employment with that organization. The suit was settled below as to its merits. This appeal concerns the circumstances of the settlement and the award of attorney fees and costs among Lenham's attorneys pursuant to the district court's order entered on August 16, 2006.

Over the course of litigation, Lenham was represented by several attorneys, four of whom are parties to this appeal. Timothy Butler and Gary L. Richardson (Butler and Richardson) associated to represent Lenham from the initiation of the suit. In June 2000, the district court granted Butler and Richardson's motion to withdraw, which alleged that Lenham was not amenable to their advice. They had advised Lenham to settle for $300,000. They filed a notice of attorneys' charging lien for $142,000. J. Edward Hollington and John Loeschen (Hollington and Loeschen) then took over the case. In January 2001, Lenham, under disputed circumstances, gave Hollington and Loeschen authority to settle for $300,000. The dispute concerned whether Lenham's offer was supposed to include certain conditions. Hollington and Loeschen communicated the offer to DAV, but by March 2001, Lenham decided that DAV had not met his conditions and that he therefore wanted to go to trial. The district court granted Hollington and Loeschen's motion to withdraw, and they filed a charging lien for 45% of the gross

proceeds of any recovery, plus gross receipts tax. Lenham obtained new counsel.

DAV then filed a motion to enforce the settlement as agreed to by Hollington and Loeschen on Lenham's behalf. DAV's motion also requested costs and attorney fees incurred as a result of Lenham reneging on the settlement agreement. On December 7, 2001, the district court ordered enforcement of the $300,000 settlement and awarded costs and fees in an amount later determined to total $26,700.52. In a final order filed July 2, 2002, the district court allowed Butler and Richardson to keep a payment of $33,884 previously made by Lenham, but otherwise denied their charging lien. The court enforced Hollington and Loeschen's lien in the amount of $142,846.88 and awarded the remaining $130,452.60 to Lenham and his new counsel. Two consolidated appeals followed, in which Lenham appealed the $26,700.52 award to DAV, and Butler and Richardson appealed the dismissal of their charging lien. In a memorandum opinion filed April 5, 2004, this Court found that the district court's order was not sufficiently supported by findings of fact and conclusions of law such that we could conduct meaningful review. We ordered the district court's order vacated and the case remanded with instructions to take further evidence, permit the parties to tender requested findings of fact and conclusions of law, make findings and conclusions sufficient to support appellate review, and enter a new order.

On remand, the parties tendered requested findings of fact and conclusions of law, and two of the attorneys involved in the case filed affidavits in support of their positions. The district court then entered an order again awarding DAV $26,700.52, and awarding Butler and Richardson their lien amount of $142,000, minus the $33,848 already paid to them, for a total of $108,152. The remainder of the $300,000 settlement was to be paid into the court pending the cost and fee application of Hollington and Loeschen, with the earlier order enforcing Hollington and Loeschen's charging lien of $142,846.8 having been vacated by this Court. On October 4, 2005, Hollington and Loeschen filed a motion to alter or amend the judgment and for relief from judgment, and on October 28, 2005, they filed a notice of appeal. This Court dismissed the appeal for a lack of a final order, as the disposition of the remainder of the settlement between Lenham and Hollington and Loeschen had been left open pending the latter's fee application.

Hollington and Loeschen applied for $88,975.74 in fees. The district court entered its final order on August 16, 2006. The court recognized that Lenham had previously been awarded and paid $130,452.60 of the $300,000 settlement. The remaining $169,547.40 was to be divided as follows: $26,700.52 to DAV, $92,850.47 to Butler and Richardson, and $49,996.41 to Hollington and Loeschen. Lenham appeals from this order.

In his brief in chief, Lenham addresses the following issues: (1) whether the court erred in enforcing the settlement agreement, (2) whether the assessment of attorney fees and costs against Lehman [sic] was in error, (3) whether the court's enforcement of charging liens filed by attorneys Butler and Richardson was in error, (4) whether there was collusion involving a jury consultant involved in the case, (5) whether the funds being held by DAV's counsel have been placed in an interest-bearing account, and (6) whether the district court judge was biased. He also addresses the timeliness of his appeal. With regard to this last issue, the district court's final order was filed August 16, 2006. Lenham filed his notice of appeal on September 15, 2006. Lenham's appeal is therefore timely. *See* Rule 12-201(A)(2) NMRA. We address the remainder of Lenham's issues in turn.

DISCUSSION

Standard of Review

An appellate court is deferential to facts found by trial court, but reviews conclusions of law de novo. *See Strata Prod. Co. v. Mercury Exploration Co.*, 121 N.M. 622, 627, 916 P.2d 822, 827 (1996). Where Lenham challenges the findings of fact of the district court, we review these findings for substantial evidence. *Berry v. Fed. Kemper Life Assurance Co.*, 2004-NMCA-116, ¶ 25, 136 N.M. 454, 99 P.3d 1166 ("If the district court has applied the correct law, we will

uphold its decision if it is supported by substantial evidence.")

"Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Landavazo v. Sanchez,* 111 N.M. 137, 138, 802 P.2d 1283, 1284 (1990). In reviewing for substantial evidence, we "resolve[ ] all disputes of facts in favor of the successful party and indulge[ ] all reasonable inferences in support of the prevailing party." *Las Cruces Prof'l Fire Fighters v. City of Las Cruces,* 1997-NMCA-044, 12, 123 N.M. 329, 940 P.2d 177.

We do not reweigh evidence on appeal. *See id.* We will affirm if there is any reasonable ground that supports the trial court's decision, the question being whether there is evidence to support the result reached, rather than whether the evidence would have supported a different result. *See Gutierrez v. Albertsons, Inc,* 113 N.M. 256, 260, 824 P.2d 1058, 1062 (Ct. App. 1991). "It is a bedrock principle of appellate practice that appellate courts do not decide the facts in a case." *State v. Gonzales,* 1999-NMCA-027, ¶9, 126 N.M. 742, 975 P.2d 355. The trier of fact is in the best position to evaluate the credibility of witnesses, and, on appeal, we do not draw our own conclusions about the credibility of witnesses, *See Tallman v. ABF (Arkansas Best Freight*), 108 N.M. 124, 127, 767 P.2d 363, 366 (Ct. App. 1988). Finally, we note that the fact finder is free to reject either party's version of events. *See State v. Rojo,* 1999-NMSC-001, ¶19, 126 N.M. 438, 971 P.2d 829.

Enforcement of the Settlement Agreement

Lenham contends that the district court erred in its December 1, 2001, ruling enforcing the $300,000 settlement. But Lenham did not appeal this order during the prior appeal. Nor did he raise any issues in the prior appeal contending that the court erred in enforcing the settlement. The prior ruling is now law of the case. *See Varney v. Taylor,* 79 N.M. 652, 654, 448 P.2d 164, 166 (1968) (stating that a decision in a former appeal is binding in later proceedings in the case and that this principle applies not only to questions expressly decided in the prior appeal, but also to questions which might have been but were not raised therein). Although later case law indicates that the law of the ease doctrine is discretionary, courts will choose not to apply the doctrine only in circumstances to correct an obvious injustice. *See State v. Breit,* 1996-NMSC-067, ¶ 12, 122 N.M. 655, 930 P.2d 792.

This is not such a case because there is substantial evidence in the record to support the district court's enforcement of the agreement. The court found that Hollington and Loeschen had been granted actual and apparent authority to enter into the settlement agreement on Lenham's behalf and that Lenham subsequently ratified their action. These findings and conclusions are supported in the record by the sworn affidavits and attachments thereto of Loeschen, DAV attorney Michael J. Dekleva, trial consultant Fred D. Minton, and Lenham's own affidavit. Settlement authority was found by the

court to be unconditional. Moreover, the court found that Lenham understood the case to have been settled for $300,000. These additional findings are also supported by sworn affidavit testimony cited appropriately in the district court's findings. Accordingly, we affirm the district court's enforcement of the settlement agreement between Lenham and DAV.

Attorney Fees and Costs

Lenham contends that the record does not support the district court's award of $26,700.52 in attorney fees and costs to DAV for initiating frivolous and unnecessary litigation. Contrary to Lenham's understanding, the court's findings of fact and conclusions of law make clear that the district court's award was not a discovery sanction made pursuant to Rule 1-037 NMRA, but was instead an attorney fees award made pursuant to our state's bad faith exception to the general rule that attorney fees and costs are not to be recovered by the prevailing party "in the absence of a statute, rule of court, or some agreement expressly authorizing the taxing of attorney [ ] fees in addition to ordinary costs." *Gurule v. Ault*, 103 N.M 17, 19, 702 P.2d 7, 9 (Ct. App. 1985).

> [A] New Mexico court may award attorney fees . . . when a party shows bad faith by disrupting litigation or hampering enforcement of court orders, or when it is necessary to vindicate judicial authority and make the prevailing party whole for expenses caused

> by an opponent's obstinacy under circumstances in which the opponent's behavior is characterized by bad faith or vexatious oppression.

State ex rel. N.M. State Highway and Transp. Dep't v Baca, 116 N.M. 751, 754, 867 P.2d 421, 424 (Ct. App. 1993), *rev'd on other grounds,* 120 N.M. 1, 896 P.2d 1148 (1995) (internal quotation marks and citation omitted). The amount of the award was based on the affidavit and bill of costs of DAV's attorney.

As instructed to do in our prior opinion, the court found, and supported its findings by specific record references, that Lenham had agreed to settle the case and then backed out of the agreement, necessitating additional litigation to enforce the settlement. These findings are supported in the record by Loeschen's sworn affidavits of April 19, 2001, and May 21, 2001, as well as the exhibits attached to the sworn affidavits of DAV's attorney Michael Dekleva, filed July 30, 2001, and August 9, 2001. The record is rife with sworn affidavit testimony that Lenham reneged on the final settlement agreement, ultimately requiring DAV to successfully move the court to enforce the agreement. Accordingly, we cannot say that the court abused its discretion by awarding attorney fees and costs under the bad faith exception. The evidence supports the district court's conclusion of law that "awarding the DAV its costs and fees in the amount of $26,700.52 was reasonable and justified in order for the court to vindicate its judicial authority and compensate [DAV] for the expenses incurred as a

result of frivolous and vexatious litigation," and we affirm the district court on this issue.

We note that the district court also found that Lenham, in responding to a request for production of documents, had withheld two written communications dated February 7 and February 9, 2001, which tended to show he had agreed that the case had been settled at that point in the litigation. The court specifically found that under the circumstances, "Lenham's failure to produce the February 7th and February 9th documents suggests bad faith," but found that the $26,700.52 in attorney fees and costs awarded for the expenses of enforcing the settlement was "sufficient to address the court's concern over the non-production of these documents." The request for production was part of the litigation attempting to enforce the settlement. Because the findings and conclusions make clear that the district court did not award an additional sanction for the discovery violation pursuant to Rule 1-037, this Court's concern in our memorandum opinion of April 5, 2004, that "[t]o the extent that sanctions are imposed under Rule 1-037(D), the district court should make findings determining which fees and costs were 'caused by' Lenham's failure to produce the documents in question and which fees would have been incurred regardless of the alleged abuse" is satisfied. Moreover, Lenham's arguments concerning the circumstances surrounding his withholding of the two documents are invitations to us to reweigh the evidence, which we will not do. The district court made explicit findings,

again supported by record references, outlining why Lenham, even as a lay person, was culpable in not responding to the discovery requests. We affirm the entire award of sanctions.

Butler and Richardson's Charging Lien

In our memorandum opinion filed April 5, 2004, we remanded this case to the district court with instructions to "take further evidence and to permit the parties to tender requested findings of fact and conclusions of law." As far as can be determined from the record, the only further evidence taken consists of an affidavit and billing records submitted by Loeschen and an affidavit submitted by counsel for DAV. We did not order that testimonial evidence be taken in any particular form, and we note that attorney fee matters are frequently decided on affidavits. *See, e.g., Robertson v. Carmel Builders Real Estate,* 2004-NMCA-056, 1149, 135 N.M. 641, 92 P.3d 653; *Miller v. Johnson,* 1998-NMCA-059, ¶¶ 34-35, 125 NM. 175, 958 P.2d 745. Our goal was to obtain findings of fact and conclusions of law sufficient to permit further review. Lenham now argues that the evidence submitted was insufficient to support the court's granting of Butler and Richardson's motion to enforce their charging lien, with credit given for payments already made by Lenham. We hold that the record fully supports the court's conclusion. In findings of fact numbered 1-24, the district court set forth the history of Butler and Richardson's efforts in

the case and their negotiation of a proposed settlement of $300,000, the same amount Lenham ultimately agreed to with subsequent counsel. For example, Butler and Richardson filed over 200 pleadings and responded to ten motions for summary judgment over the three-and-a-half years they represented Lenham. The district court pointed out that Lenham admitted to the existence of the fee agreement, and a copy of the agreement appears in the record. Both Butler and Richardson submitted affidavits and supporting documentation for time and effort spent on behalf of Lenham, including unpaid costs and hourly fees. The court went on to cite *Robison v. Katz,* 104 N.M. 133, 717 P.2d 586 (1986), for the proposition that an attorney may assert a charging lien even though he or she is not the party's current attorney at the time a fund is obtained from the attorney's efforts. Finally, the court cited to the record to establish that Butler and Richardson's withdrawal was reasonable under the circumstances, and it granted Butler and Richardson's motion "[b]ased on equitable considerations."

First, we hold that Butler and Richardson's lien was properly enforced. The factors necessary to find a charging lien enforceable are a valid contract, either express or implied, between attorney and client; a fund recovered by the attorney; clear and unequivocal notice to appropriate parties of the intent to assert the lien; and timely assertion of the lien before distribution of the proceeds recovered for the client. *Sowder v. Sowder,* 1999-NMCA-058 ¶¶ 10-14, 127 N.M. 114, 977 P.2d 1034.

"A charging lien first requires a valid contract, either express or implied, between attorney and client." *Id.* ¶ 10. Here there exists a written agreement as well as a course of conduct between the parties supporting the existence of the contract. Although Lenham asserts that the contract is "subject to Oklahoma courts," he provides no case law or other authority for the proposition that the contract is somehow unenforceable under either Oklahoma or New Mexico law. The contract does not set out by its terms exclusive jurisdiction and venue, and in the course of seven years of litigation in this case, there has been no challenge to the contract even as the parties have subjected themselves continuously to New Mexico jurisdiction and venue through both favorable and adverse rulings.

Although it is clear that Butler and Richardson did not recover a fund on Lenham' s behalf, our courts have previously found that the requirement that the fund be recovered by the efforts of the charging attorney is satisfied when the attorney "contribute[d]" to the ultimate judgment received. *Robison v. Campbell,* 99 N.M. 579. 584, 661 P.2d 479, 484 (Ct. App. 1983). Consistent with the holding of *Robison,* the district court found that Butler and Richardson contributed heavily to the recovery of the $300,000 ultimately awarded to Lenham, a conclusion that we hold is supported by the record.

The record also supports a finding that the third requirement, "that clear and unequivocal notice be given of the intention to assert a lien against any judgment or recovery so that all parties concerned are

aware that no voluntary payment should be made without protecting the attorney's claim of fees and costs," has been met. *See Sowder,* 1999-NMCA-058, ¶ 12 (internal quotation marks and citation omitted). The lien was filed with the district court by Butler and Richardson on June 12, 2000, and was faxed and mailed to all counsel of record and to Lenham on the same day.

Finally, the fourth requirement, that assertion of the lien be timely, has been met. *See Sowder,* 1999-NMCA-058, ¶ 14. A charging lien is waived if the attorney falls to give notice of his intention to assert it before the proceeds of the judgment have been distributed. Id. Here, the charging lien was filed well before the distribution of any proceeds. Accordingly, all four requirements of a valid charging lien have been established by Butler and Richardson and are adequately supported by the record.

Second, we hold further that the fee was reasonable. "Because a court exercises its equitable powers in enforcing an attorney's charging lien, it may inquire into the reasonableness of the asserted fee for purposes of enforcing the lien." *Northern Pueblos Enters. v. Montgomery,* 98 N.M. 47, 49, 644 P.2d 1036, 1038 (1982). Lenham signed a contingency fee agreement for 50% of the proceeds. Butler and Richardson's fee, had they been Lenham's sole attorneys and obtained the $300,000, should have come as no surprise to Lenham. The district court's rationale in initially allowing Butler and Richardson's lien in full in the order of September 21, 2005, was

apparently that they had done essentially all of the work. This was not entirely correct, as Lenham had not yet agreed to the $300,000 settlement at the time they withdrew, nor had work been done on finalizing the details of the settlement and otherwise bringing the case to an end. Our concerns in this regard are adequately resolved, however, by Butler and Richardson's eventual agreement in the August 16, 2006, final order to settle for a total of $126,698.47, representing the $92,850.47 awarded in the final order plus $33,848 previously paid by Lenham. This amount was substantially less that the lien amount of $142,000. Accordingly, we hold that the attorney fee paid to Butler and Richardson was reasonable under the circumstances, and we affirm the district court's enforcement of the charging lien. Finally, Lenham's argument against Loeschen and Hollington's attorney fee agreement provisions for charging liens is moot, because the district court in fact set aside Loeschen and Hollington's contingency fee agreement. To the extent that Lenham contends that Loeschen and Hollington were awarded fees in quantum meruit for work not done, this issue was not raised in the trial court and cannot be raised for the first time on appeal. *See Woolwine v. Furr's, Inc.*, 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987).

Other Issues

In his brief in chief, Lenham presents three additional issues that were not raised in the district court and find no support in the record. First, he

presents us with a narrative discussion concerning allegations of "collusion" between a jury selector involved in litigation in the district court and his attorneys. His brief does not explain how these allegations were either preserved in the district court or how they otherwise find support in the appellate record. An appellate court's role is limited to the review of those matters decided by the district court. *Moffat v. Branch,* 2005-NMCA-103, ¶ 8, 138 N.M. 224, 118 P.3d 732. "This Court will not consider and counsel should not refer to matters not of record in their briefs." *In re Aaron L.,* 2000-NMCA-024, ¶ 27, 128 N.M. 641, 996 P.2d 431.

Second, Lenham asks whether the funds being held by DAV's counsel have been placed in an interest bearing account. This question presents no issue for decision on appeal. For the sake of clarification, however, DAV states in its brief that DAV's award, along with the award to Butler and Richardson and Hollington and Loeschen are being held in the interest-bearing IOLTA trust account of DAV's counsel until final resolution of this matter.

Third, Lenham alleges "bias" on the part of the district court judge, apparently because when the judge addressed the parties from the bench on the topic of professionalism, she repeatedly used phrases such as "we as attorneys," and "we attorneys." Lenham seems to suggest that because the judge included herself in the class of persons subject to professional standards, she was biased against him and partial to the arguments of Lenham's former

attorneys. We fail to see how these statements by the judge demonstrate any bias or impartiality on her part.

CONCLUSION

We affirm. The parties shall bear their own fees and costs on appeal.

IT IS SO ORDERED.

/s/ Lynn Pickard
LYNN PICKARD, Judge

WE CONCUR:

/s/ Jonathan B. Sutin
JONATHAN B. SUTIN
Chief Judge

/s/ Michael E. Vigil
MICHAEL E. VIGIL,
Judge

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

ROBERT LENHAM,

Plaintiff-Appellant,

vs.

Nos. 23,410 & 23,506

DISABLED AMERICAN VETERANS,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT
OF SANTA FE COUNTY
Carol J. Vigil, District Judge

Joseph P. Kennedy
Kennedy & Oliver, P.C.
Albuquerque, New Mexico

Attorney for
Plaintiff-Appellant

William C. Madison
Michael J. Dekleva
Kimberly A. Middlebrooks
Madison, Harbour, Mroz
& Brennan, P.A.
Albuquerque, New Mexico

Attorneys for
Defendant-Appellee

Gary L. Richardson
Charles L. Richardson
Richardson, Stoops & Ward
Tulsa, Oklahoma

Timothy L. Butler
Santa Fe, New Mexico

J. Edward Hollington
J. Edward Hollington & Assoc., P.A.
Albuquerque, New Mexico

John L. Loeschen
Loeschen & Loeschen
Burlington, Iowa — Interested Parties

MEMORANDUM OPINION

(Filed Apr. 5, 2004)

ALARID, Judge.

Plaintiff, Robert Lenham, appeals a decision awarding Defendant, Disabled American Veterans, $26,700.52 in costs and attorney's fees as sanctions for bad faith litigation or in the alternative, as sanctions for discovery abuses. Lenham also appeals from a decision enforcing an attorney's charging lien in favor of his second set of attorneys, J. Edward Hollington and John Loeschen. Timothy L. Butler and Gary L. Richardson, Lenham's original attorneys, appeal from an order dismissing their attorney's charging lien. In each instance, we reverse and remand for the entry of findings of fact and conclusions of law sufficient to support meaningful appellate review.

BACKGROUND

In July 1996 Lenham sued his former employer, Defendant Disabled American Veterans (the DAV). Timothy L. Butler, a New Mexico attorney, prepared and filed the complaint. Lenham discharged Butler and hired the firm of Oklahoma lawyer Gary L. Richardson. Lenham and Richardson entered into a written contingency fee agreement, which also

provided for hourly billing at reduced rates. With Lenham's knowledge, Richardson re-retained Butler as New Mexico co-counsel. There is no written fee agreement between Lenham and Butler. Butler and Richardson vigorously litigated the case.

As the July 2000 trial date approached, the DAV expressed interest in a settlement. Concerned by problems with Lenham's case, Butler and Richardson pressed Lenham for authority to make a settlement offer at $275,000-$300,000, which they believed was reasonable. Lenham refused, eventually advising Richardson that Lenham and his wife "fe[lt] the Lord is directing us to take this issue to trial." When further attempts to extract settlement authority were unsuccessful, Butler and Richardson moved to withdraw. Butler and Richardson filed an attorney's charging lien charging client $142,000. The district court granted Butler and Richardson's motion to withdraw and vacated the pending July 2000 trial date in a June 14, 2000 order.

Shortly after Butler and Richardson's withdrawal, Leham [sic] retained as his attorneys, Appellees, J. Edward Hollington of Albuquerque and John L. Loeschen of Burlington, Iowa. In September 2000 Hollington and Loeschen entered into a written contingency fee agreement with Lenham. The Hollington-Loeschen fee agreement expressly recognized Hollington and Loeschen's right to assert a charging lien upon any recovery, whether by settlement or judgment.

There is no dispute Loeschen met with Lenham and his wife on January 6-7, 2001, and that during the January 6-7 meeting Lenham authorized Loeschen and Hollington to offer to settle the case for $300,000. On January 8, 2001, Loeschen and Hollington met with counsel for the DAV and offered to settle the case for $300,000.

On January 26, 2001, Loeschen spoke with counsel for the DAV, who informed Loeschen that the DAV had accepted the January 8 offer to settle the case for $300,000. Both Loeschen and Hollington spoke with Lenham on January 26. Around this time relations between Lenham and his counsel and Lenham and the DAV begin to sour. Lenham was not present at the January 8, 2001 settlement conference; accordingly, he had no personal knowledge of the settlement terms Loeschen and Hollington communicated to the DAV. The principal dispute between Lenham and Loeschen and Hollington, and eventually between Lenham and the DAV, was whether Lenham had instructed Loeschen and Hollington during the January 6-7 meeting to attach certain conditions to Lenham's agreement to settle.

In a January 30, 2001 letter, Loeschen urged Lenham to accept the settlement, warning Lenham that counsel for the DAV was prepared to bring suit against Lenham to enforce the settlement. Lenham refused to execute the settlement documents, maintaining that although the DAV had agreed to pay $300,000, he had not authorized a settlement unless DAV also agreed to his conditions. On March

4, 2001, Lenham wrote Loeschen stating that "We can argue this point until we 'are blue in the face', but I'll say it again . . . the conditions I originally authorized you to present to the DAV were not met. I therefore, once again, request my right to go to trial with you as my attorney."

Lenham's refusal to accept the settlement negotiated by Loeschen and Hollington led to a breakdown of relations between Lenham and counsel. On April 9, 2001, Loeschen filed a motion to withdraw as counsel, citing Lenham's "insistence upon pursuing an objective that counsel of record considers imprudent." Loeschen asserted that "at this point [I am] unable to zealously, effectively, and in good faith continue to represent the interest and objectives of the Plaintiff at the trial of this matter." On May 16, 2001, Hollington filed a motion to withdraw as counsel citing the same grounds. Loeschen and Hollington filed a notice of charging lien.

Lenham retained a third set of attorneys, New Mexico attorney D. Todd Lazar and Honolulu, Hawaii attorney William E. H. Tagupa.

In the meantime, the DAV had filed a motion to enforce the settlement. The DAV argued that Loeschen and Hollington had had express authority from Lenham to settle the case for $300,000. The DAV requested an award of attorney's fees and costs as sanctions for Lenham's bad faith in repudiating the settlement.

Lenham, now represented by Tagupa and Lazar, filed a response arguing that Lenham and the DAV had not reached a meeting of the minds. Citing *Augustus v. John Williams & Assoc., Inc.*, 92 N.M. 437, 589 P.2d 1028 (1979), Lenham's response argued that Loeschen and Hollington had lacked actual authority to make a settlement offer that omitted conditions imposed by Lenham. Lenham's response quoted the following excerpt from Lenham's January 29, 2001 letter to Loeschen:

> During your visit with us [Lenham and his wife] on January 6th and 7th, we discussed various options and agreed to settle with the DAV based strictly on the following conditions. If these conditions were not met then we were ready to go to trial. (This could be done according to your calculations made that evening if the DAV were to make the $300,000 punitive damages):
>
> 1. Making a $300,000 settlement offer if it would net me $195,000 (Please note that when I refer to the net amount of $195,000, I am referring to the actual cash amount "in my pocket", so to speak, after all debts, liens, fees etc. have been satisfied.
>
> 2. The DAV's response must be made in 7 days[.]
>
> 3. The check would be mailed to you and placed in your trust account so you could handle the disbursement including preventing Richardson and Butler form [sic]

> "tying up" the money by taking advantage of the judicial system of New Mexico.

Quoting from *Augustus*, Lenham argued that "'[a]n unauthorized compromise, executed by an attorney, unless subsequently ratified by his client, is of no effect and may be repudiated or ignored and treated as a nullity by the client.'"

The DAV filed a reply in which it argued that Lenham had not communicated any alleged conditions to his counsel prior to January 8, 2001, when Loeschen and Hollington communicated to counsel for the DAV an unconditional offer to settle for $300,000. For the first time, the DAV argued that Loeschen and Hollington had had apparent authority or alternatively, that even if they had lacked apparent authority on January 8, 2001, Lenham subsequently had ratified the settlement. The DAV attached the affidavit of Fred D. Minton, who had been present during the January 6-7, 2001 meeting between Lenham and Loeschen. Minton's affidavit refuted Lenham's claim that he had attached conditions to the settlement offer. The DAV also attached an affidavit executed by Loeschen on May 21, 2001. Loeschen expressly denied Lenham's claims that Lenham had imposed, as conditions of settlement, an express deadline for acceptance and a net recovery of $195,000.

The district court conducted a hearing on the DAV's motion on August 24, 2001. A considerable

portion of the transcript consists of the unsworn arguments and statements of counsel and references to exhibits filed in the record. Lenham, Loeschen and Hollington were present and gave testimony under oath.

Lenham testified that Loeschen had advised him during discussions on January 7, 2001, that punitive damages would not be taxable and had calculated the net recovery on a $300,000 settlement characterized as punitive damages. Lenham testified to his understanding that the significance of punitive damages was "[t]hat there [would] be no taxes on anything that was given under punitive damages." Hollington and Loeschen both testified to their belief that they had made a valid settlement offer at the January 8, 2001 meeting with counsel for the DAV.

At the end of the hearing the district court made an oral ruling, granting the DAV's motion:

> When I was listening to today's case, one of the things that struck me, and it was because of Mr. Tagupa's use of legal maxims when something came to mind that our Supreme Court has been very, very interested in, and it comes by way of making sure that when we as attorneys are practicing, that we deal with each other in a very professional manner. It's called professionalism. And, you know, we attorneys, really don't have a lot of things except our credibility, and if we don't have our credibility, we don't really – we don't have

> anything. An attorney's word is his or her bond, comes to mind. And with that I am going to grant the Motion to Enforce the Settlement. I believe the second draft was the settlement that was approved by the attorneys. I'm going to find that Mr. Loeschen and Mr. Hollington had actual authority from the [Plaintiff] to enter into this agreement.
>
> The evidence does not support the Defendant's claims especially concerning time limits and other additional issues that were brought up later on.
>
> I'm real concerned also because of the amount of time that it took to get the discovery. . . .
>
> . . .
>
> I'm going to also find that there were some discovery abuses in the production of the documents that supported ratification of this agreement, and as a result I'm going to grant attorneys' fees and costs concerning this motion to enforce.

On December 7, 2001, the district court entered an order granting the DAV's motion to enforce, and the DAV's motion for sanctions. The December 7, 2001 order did not fix the amount of costs and fees to be awarded to the DAV.

On February 18, 2002, the district court held a hearing on various matters, including the amount of costs and fees to be awarded to the DAV and the

validity of the attorney's charging liens filed by Butler and Richardson and Loeschen and Hollington.

Butler appeared on behalf of himself and Richardson. Butler argued that the lien should be enforced to the full extent that fees were allowable under the Lenham-Richardson contingency fee agreement. In the alternative, Butler argued that the lien should be enforced to the extent that Butler and Richardson were entitled to recovery in *quantum meruit*. Butler conceded that an attorney who voluntarily withdraws is precluded from recovering fees; however, Butler argued that Lenham's rejection of their advice to settle provided "justifiable cause for withdrawing."

Hollington and Loeschen were both present. Hollington, speaking for both himself and Loeschen, referred the district court to the fee agreement between Lenham and Loeschen-Hollington. Hollington argued that Loeschen had had to review over twenty boxes of documents and had performed "a lot of work in reviewing, analyzing this case, not only getting . . . ready for trial, but, of course, getting it ready for an attempt to try to evaluate a settlement," and that the $300,000 settlement with the DAV was reached through his and Loeschen's efforts. Hollington argued that he and Loeschen had been "forced" to withdraw when Lenham denied that they had had authority to settle the case.

In response to Butler and Richardson, Lazar, representing Lenham, argued that (1) the evidence

did not establish $300,000 as the settlement value of the case at the time Butler and Richardson withdrew, (2) Lenham's decision to take the case to trial did not constitute cause for withdrawing, and (3) the Lenham-Richardson fee agreement did not authorize a charging lien. In response to Hollington and Loeschen, Lazar argued that (1) Loeschen had contacted counsel for the DAV and confirmed the DAV's willingness to settle for $300,000 before he and Hollington even entered an appearance, and (2) Loeschen and Hollington had negotiated a settlement that "completely ignored" conditions imposed by Lenham.

Following Lenham's response, both counsel for the DAV and Loeschen took issue with Lazar's statement that Loeschen and the DAV had agreed to a settlement before Loeschen entered an appearance. In rebuttal, Lazar pointed out that in its memorandum in support of its motion to enforce, the DAV had made that very representation.

The district court entered a decision on April 30, 2002, awarding the DAV costs of $657.02 and attorney's fees of $26,043.50; allowing Butler and Richardson to retain $33,884.00 previously paid by Lenham, but denying Butler and Richardson further compensation and "dismissing" their charging lien; and enforcing Loeschen and Hollington's lien as to $142,846.88 out of the $300,000 settlement amount.

DISCUSSION

We begin with an admonishment to counsel. Contrary to the assertions of counsel for the DAV in both this Court and the district court, the record does not support the DAV's effort to portray Lenham as a serial reneger. Our review of the record satisfies us that there is absolutely no evidence that Lenham ever authorized Butler and Richardson to settle his case for $300,000. Contemporaneous correspondence between Lenham, Butler and Richardson reflects growing frustration on the part of Butler and Richardson precisely because Lenham refused to give Butler and Richardson authority to settle for $300,000. This correspondence between Lenham, Butler and Richardson was attached to the papers offered in support of the DAV's motion to enforce, and we must presume that counsel for the DAV was aware of the content of this correspondence when they repeatedly represented to the district court at the August 24, 2001 hearing that Lenham had backed-out of an earlier settlement negotiated by Richardson, and when they represented to this Court that this case has settled twice. Even if we consider the unsworn representations of the DAV's counsel during the August 24, 2001 hearing, the best case that can be made out is that Richardson, without having obtained actual authority from Lenham, represented to the DAV's counsel that he could obtain authority to settle for $300,000 if the DAV would confirm $300,000 was available. This testimony does not demonstrate reneging on Lenham's part; rather, it

demonstrates the peril of counsel's negotiating ahead of his actual authority.

We leave it to the district court to determine whether counsel for the DAV acted in good faith in representing to the district court that Lenham had twice reneged on a settlement. The fact that this representation actually distorted the district court's understanding of the facts and may have influenced the district court's decision on the merits is reflected by the district court's recital in its April 20, 2002 decision that "[t]his matter has been through two major settlements." Because we are reversing and remanding on other grounds, we encourage the district court to revisit the issues of the appropriateness and amount of sanctions in light of the observations set out above.

1. Sanctions for Bad Faith

In *State ex rel. N.M. State Highway & Transp. Dep't v. Baca*, 120 N.M. 1, 896 P.2d 1148 (1995), our Supreme Court recognized a bad-faith litigation exception to the American Rule governing attorney's fees. Imposition of sanctions under *Baca* are reviewed for an abuse of discretion. *Id.* at 8, 896 P.2d at 1155.

The district court concluded that the parties had reached a binding settlement agreement on alternative theories of actual and apparent authority. We consider each of these theories in turn.

"To establish apparent authority, the relying party must base the relationship upon words or acts of the principal, and not the representations or acts of the agent." *Tercero v. Roman Catholic Diocese of Norwich*, 2002-NMSC-018, ¶ 12, 132 N.M. 312, 48 P.3d 50 (internal quotation marks omitted). It is well settled that a client's employment of an attorney does not of itself give rise to apparent authority to settle the client's case. *Augustus*, 92 N.M. at 439, 589 P.2d at 1030. There is no evidence of any conduct *by Lenham*, (who was not present during the settlement conference) other than his employment of Loeschen and Hollington, that would have led counsel for the DAV to assume that Loeschen and Hollington had *unconditional* authority to settle the case. To the extent the DAV's motion to enforce was based on a claim of apparent authority, opposition was neither frivolous nor in bad faith.

In view of our conclusion that Lenham did not act in bad faith in opposing the DAV's claim of apparent authority, the propriety of sanctions for bad faith ultimately depends on whether Lenham lacked a good faith basis either in fact or in law for opposing the DAV's claim that Loeschen and Hollington had actual authority to make an offer that did not include the conditions referred to in Lenham's letter of January 29, 2001. As we understand *Baca's* exception to the American Rule, sanctions are not justified merely because a party's position appears erroneous in hindsight. *Baca's* exception must not be applied so freely as to swallow the American Rule by routinely

allowing attorney's fees to a prevailing party. Bad faith refers to a litigant's or attorney's subjective state of mind, requiring an inquiry into what the party to be sanctioned actually knew or believed about the factual and legal merits of his position. *Cf. Rivera v. Brazos Lodge Corp.*, 111 N.M. 670, 674, 808 P.2d 955, 959 (1991) (discussing bad faith in the context of Rule 1-011NMRA 2004). Where bad faith sanctions are sought directly against a non-lawyer, a court must be sensitive to the possibility that a layperson entertained a mistaken, but nevertheless good faith, view of the law. *See id.* at 675, 808 P.2d at 960 (distinguishing between grounds for awarding sanctions against client and grounds for awarding sanction against attorney).

Like *Baca,* this is a case where the district court's findings and conclusions are inadequate to support sanctions. There are no findings or conclusions addressing Lenham's actual understanding of the factual and legal merits of his position on actual authority. However, we cannot say as a matter of law that the record lacks substantial evidence supporting the district court's decision. We therefore reverse and remand to give the parties the opportunity to submit proposed findings of fact and conclusions of law and to give the district court an opportunity to enter more detailed findings and conclusions. To assist this Court, should this case again come before this Court, we direct that each proposed finding of fact submitted by a party shall contain a cite to the specific portion of the record supporting that finding. We remind

counsel for the parties and the district court that the argument of counsel is not evidence. *G & G Servs., Inc. v. Agora Syndicate, Inc.*, 2000-NMCA-003, ¶ 51, 128 N.M. 434, 993 P.2d 751.

2. Discovery Sanctions

As an alternative ground for recovering attorney's fees, the DAV argued that sanctions were justified by alleged discovery abuse on the part of Lenham. A few additional facts are required in order to understand this issue. On or about May 7, 2001, in connection with its motion to enforce, the DAV mailed to Lenham's counsel the following request for production of documents:

> ***REQUEST NO. 1***: Please produce all copies of correspondence, memoranda, and any other documents generated by Mr. Lenham, Mrs. Lenham, any other third persons, or his current or former attorneys regarding the subject of settlement generally, or regarding any and all settlement negotiations during the pendency of this lawsuit.

In response to the DAV's request for production, Lenham executed an "affidavit" authenticating fourteen attached letters as "true and correct copies or portions of copies sent or received by me concerning the proposed settlement agreement with the Disabled American Veterans and/or pertaining to the Liens placed on this case." This affidavit was received by counsel for the DAV on June 5, 2001.

Previously, in his May 21, 2001 affidavit, Loeschen had referred to correspondence he received from Lenham on February 7 and 9, 2001. For reasons that do not appear of record, Lenham did not attach the February 7 and 9, 2001 correspondence to his affidavit, even though the remaining correspondence between Lenham and Loeschen was produced. When the February 7 and 9, 2001 documents were not produced with the other correspondence attached to Lenham's June 2, 2001 affidavit, counsel for the DAV showed the fourteen produced documents to Loeschen, who confirmed that there were additional documents that Lenham had not produced. The DAV filed a July 6, 2001 motion seeking an expedited determination of whether Lenham had waived the attorney-client privilege. Referring to Loeschen's affidavit, the DAV's motion asserted that "[o]n information and belief, Loeschen is in possession of additional correspondence from Lenham that is potentially dispositive with regard to the DAV's Motion to Enforce Settlement Agreement," but that Loeschen had declined to produce it without an order either (1) determining that the attorney-client privilege had been waived as to settlement negotiations, or (2) compelling production of the documents. On July 17, 2001, Lenham, by now represented by Tagupa and Lazar, filed a memorandum both objecting to the DAV's motion and requesting a protective order. Lenham proposed as a compromise to the discovery dispute that any documents in Loeschen's possession should be submitted to the district court for *in camera* inspection.

The district court appears to have granted the DAV's discovery motion during a July 31, 2001 telephonic hearing. On August 21, 2001, the district court entered a written order directing Loeschen to produce correspondence between Loeschen and Lenham concerning settlement.

The text of the disputed correspondence, which consists of two fax cover sheets with handwritten notes, is set out below:

> [February 7, 2001]
>
> Re: Settlement
>
> John – Following are the IRS requirements for taxable and non-taxable damages on the lawsuit. If you should have any questions, feel free to contact [my accountant]. Hopefully you able to do some "creative figuring" on our award.
>
> [February 9, 2001]
>
> John – Hope you have had a *GREAT* weekend. If the DAV starts placing demands on this settlement I am suggesting we advise them that we will go to trial.

On August 9, 2001, the DAV brought a motion for sanctions pursuant to Rule 1-037(D) NMRA 2004 or, in the alternative, the district court's inherent power to enforce discovery rules. The DAV asserted that in response to a request for all correspondence between Lenham and his attorneys relating to the settlement of the lawsuit Lenham had "withheld" the February 7

and 9, 2001 faxes. The DAV asserted that Lenham was guilty of a "willful, bad faith failure to produce critical documents in response to the DAV's request for production." The district court granted the DAV's motion, finding that "[t]he DAV incurred substantial legal fees and costs as a result of Lenham wrongfully reneging on the settlement agreement, and *his subsequent abuse of the discovery process, where he withheld documents probative of the issue of ratification of the settlement agreement.*" (Emphasis added).[1]

We cannot determine the district court's reasoning from the district court's written rulings on sanctions. To the extent the district court relied on *Baca* as applied to the context of bad faith in discovery, *see Marchman v. NCNB Texas Nat'l Bank*, 120 N.M. 74, 90, 898 P.2d 709, 725 (1995) (citing *Baca* as authority for discovery sanctions), we must reverse and remand for entry of findings of fact and conclusions of law justifying an award of sanctions for bad faith. The district court should bear in mind our observations set out above regarding the subjective nature of bad faith and its application to non-lawyers. To the extent that the sanctions are awarded for mere non-disclosure under Rule 1-037(D), *see Enriquez v.*

---

[1] Although the order justified the award of sanctions on the ground that Lenham "withheld [critical] documents probative of the issue of ratification," the district court in fact did not rest its decision enforcing the settlement on ratification: there are no findings expressly addressing ratification.

Cochran, 1998-NMCA-157, ¶ 45, 126 N.M. 196, 967 P.2d 1136 (observing that wrongful intent is not required for the imposition of discovery sanctions), the district court should enter findings and conclusions demonstrating that it properly "balance[d] the nature of the offense, the potential prejudice to the parties, the effectiveness of the sanction, and the imperative that the integrity of the court's orders and the judicial process must be protected," *id.* ¶ 48.

Lastly, we note that Rule 1-037(D) authorizes a district court to award a party reasonable expenses, including attorney's fees, "caused by" another party's failure to respond to a request for production. However, the entire $26,700.52 in fees and costs incurred by the DAV in enforcing the settlement cannot as a matter of logic have been "caused by" Lenham's alleged abuse of discovery. Most obviously, attorney's fees incurred in preparing the DAV's motion to enforce, which was filed on April 19, 2001, prior to service of the DAV's request for production, cannot have been "caused by" a default in responding to a subsequent discovery request. To the extent that sanctions are imposed under Rule 1-037(D), the district court should make findings determining which fees and costs were "caused by" Lenham's failure to produce the documents in question and which fees and costs would have been incurred regardless of the alleged abuse.

3. Attorney's Charging Liens

A district court's decision to enforce or extinguish an attorney's charging lien involves an exercise of the court's equitable powers. *Northern Pueblo Enters. v. Montgomery*, 98 N.M. 47, 49, 644 P.2d 1036, 1038 (1982). We review a district court's decision in a proceeding on a charging lien for an abuse of discretion. *Philipbar v. Philipbar*, 1999-NMCA-063, ¶ 9, 127 N.M. 341, 980 P.2d 1075.

The district court's rulings on the attorney's liens present the same problems that we have noted above with respect to the DAV's motion to enforce and the rulings on sanctions: although there appears to be substantial evidence that might support the district court's rulings under unarticulated rationales, we cannot determine the actual factual and legal basis for the court's rulings from its order. We realize of course that Rule 1-052(A) NMRA 2004 generally does not require a district court to make findings of fact and conclusions of law in determining motions. Whether a proceeding on an attorney's lien is a "motion" or a "case tried by the court without a jury" for purposes of Rule 1-052 is a question we leave for another case. A remand for entry of findings of fact and conclusions of law may be justified even though Rule 1-052 is not strictly applicable. *E.g., Baca*, 120 N.M. at 9, 896 P.2d at 1156 (remanding for additional findings of fact on issue of sanctions); *Rest, Mgmt. Co. v. Kiddo-Fenwal, Inc.*, 1999-NMCA-101, ¶ 23, 127 N.M. 708, 986 P.2d 504 (same).

As we have noted above, the arguments of counsel are not evidence. Nonetheless, the arguments of counsel have presented us with what appears to be a troubling conflict in the representations made to the district court. In the DAV's memorandum in support of its motion to enforce, counsel for the DAV represented to the district court that

> On June, 30, 2000, after Richardson and Butler withdrew from representing Lenham, John Loeschen, an attorney practicing in Burlington, Iowa, contacted the attorneys for the DAV. Loeschen advised the DAV's counsel that he would be representing Lenham with New Mexico attorney J. Edward Hollington, and that his client wanted to settle the case for the summer 2000 settlement amount. According to Loeschen, Lenham would have accepted the summer 2000 settlement amount, but contended that he [Lenham] had not been advised by Richardson and Butler that the sum had been offered. In response to Loeschen's inquiry, the DAV's attorney advised Loeschen that he would need to inquire into whether that sum was still available.

At the February 18, 2002 hearing, Lazar argued that the award of fees based on the Loeschen-Hollington contingency fee agreement was unreasonable because Loeschen knew what the case would settle for before he even entered into the September 2000 contingency fee agreement with Lenham.

Loeschen responded with indignation to Lazar's argument:

> I have no idea what Mr. Lazar is referring to or alluding to, and I do consider those statements to be an attack on my professional integrity and also upon my credibility. I have my hourly time spent on this case, and *in no way, shape or form did I ever know that there was ever an amount offered in settlement in this case until I had discussions with [counsel for the DAV] and we had talked about the possibility of settling this case.* (Emphasis added).

In rebuttal, Lazar cited tc the portion of the DAV's memorandum set out above. In their brief in this Court, Loeschen and Hollington do not refer to a June 30, 2000 conversation concerning settlement between Loeschen and counsel for the DAV. Loeschen and Hollington represent that settlement negotiations were initiated "in late 2000 with DAV attorneys."

As our previous remarks concerning counsel for the DAV's misstatement of the record demonstrate, we take very seriously the duty of candor imposed by the Rules of Professional Responsibility. Moreover, apart from ethical concerns, the DAV's statements, if true, suggest a possible material breach of fiduciary duty on the part of Loeschen; entering into the September 2000 contingency fee agreement with Lenham without disclosing to Lenham the possibility that the case could be settled with minimal litigation and little risk of non-recovery, and hence the

possibility that an hourly fee arrangement would have been in Lenham's best interests. *See* Restatement (Third) of the Law Governing Lawyers § 18 cmt. e (2000) (discussing heightened scrutiny of lawyer-client contracts entered into during a representation); *see also id.* § 35 cmts. c, d (2000) (observing that a contingency fee may be unreasonable where at the inception of the fee agreement there is little risk of non-recovery).

On remand, the district court should enter findings resolving the factual issues of when Loeschen first contacted counsel for the DAV to discuss settlement and when Loeschen first came to believe that the case could be settled for $300,000. The district court should determine whether actual misstatements of fact concerning the substance of the June 30, 2000 conversation were made to the district court, and if so, how and why they came to be made. Counsel for the DAV and Loeschen should be permitted to submit additional evidence and argument defending, clarifying or explaining their representations.

CONCLUSION

Because the district court's decision is not supported by findings of fact and conclusions of law that enable us to conduct meaningful review, we vacate the orders denying enforcement of the Bulter [sic]-Richardson lien, enforcing the Hollington-Loeschen lien and awarding sanctions against Lenham. We

remand with instructions to the district court to take further evidence and to permit the parties to tender requested findings of fact and conclusions of law. The district court is further instructed to make findings of fact and conclusions of law sufficient to support appellate review and to enter new orders on those findings of fact and conclusions of law. The parties shall bear their own costs and attorney's fees incurred on appeal.

IT IS SO ORDERED.

/s/ A. Joseph Alarid
A. JOSEPH ALARID, Judge

I CONCUR:

/s/ Michael D. Bustamante
MICHAEL D. BUSTAMANTE, Judge

/s/ Lynn Pickard
LYNN PICKARD, Judge
(concurring in result only)

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

ROBERT LENHAM

Plaintiff-Appellant

Vs.

DISABLED AMERICAN VETERANS

Defendant-Appellee

Court of Appeals
No. 27,087
Santa Fe County
D0101-CV-96-01601

MOTION TO DISQUALIFY JUDGE MICHAEL E. VIGIL FROM PRESIDING OVER THIS CASE AND MOTION TO VACATE JUDGE MICHAEL VIGIL'S PROPOSED SUMMARY DISPOSITION OF THIS CASE.

(Filed Oct. 8, 2008)

Plaintiff-Appellant Robert H. Lenham respectfully requests the recusal of Court of Appeals Judge Michael E. Vigil from this case and requests that his Proposed Summary Disposition be vacated pursuant to (but not limited to) New Mexico Rules, New Mexico Laws, New Mexico Constitution, New Mexico Judicial Code of Conduct, National Center for State Courts, American Bar Association Model Code of Judicial Conduct, and numerous New Mexico Judicial Advisory Committee on the Code of Judicial Conduct decisions for his impartiality and/or appearance of impartiality due to the fact that five of the attorneys involved in this case were Judge Michael E. Vigil's Judicial Campaign Committee Members for his re-election to the position he holds today. They are:

DeKleva	Law firm of Madison, Harbour, Mroz & Brennan, P.A.
Brennan	Law firm of Madison, Harbour, Mroz & Brennan, P.A.
Harbour	Law firm of Madison, Harbour, Mroz & Brennan, P.A.
Ed Hollington	(pro hac vice John Loeschen)
*Joe Kennedy	

Please note that attorney Bill Madison has been the lead attorney for the Defendant Disabled American Veterans, and it is his law firm that employs three of Judge Michael E. Vigil's judicial campaign committee members.

[After consultation with the original panel, the motion is denied. Lynn Pickard Presiding Judge 10-10-08 /s/ LP]

*Note – Joe Kennedy filed a motion to withdraw as my lawyer on Feb. 21, 2007 and was approved to do so the very next day. The court's action to expeditiously accept his withdrawal, denied me the opportunity to contest the action, ultimately compromising my ability to have a New Mexico licensed attorney represent me at such a late hour. I was informed by the first attorney contacted, that when she tried to access the case for consideration, she learned that the case was sealed. Every attorney I spoke to (over 12) said they could not possibly respond to Michael E. Vigil's Proposed Summary Disposition without access to the case. In light of the dilemma (and Joe Kennedy's refusal to return any of my calls), I filed a motion for an extension of time

(which was graciously granted) and a motion to unseal the file, which was denied. The case was finally 'unsealed' (many weeks later) when newspaper reporter, Tom Cole, from the Albuquerque Journal (he was concerned about the 'justice/fairness' of the situation) went to see the judge who sealed the case (Judge Daniel Sanchez). The judge informed the reporter that the case was 'sealed in error' and that it would be unsealed immediately. I spent the next several weeks trying to access the case and was told by Janet at the court that "Adrian' was trying to 'fix' the problem. I ran out of time to hire an attorney (the last attorney said he would not have time (I was down to 3 days before the deadline to respond to this Proposed Summary Disposition) even if he were paid an exorbitant amount of money to do so. As a result, I find myself representing myself pro se, out of necessity.

The applicable references to support this matter are as follows:

Code of Judicial Conduct, Section 3E(1) **"A judge shall disqualify himself or herself (when) the judge's impartiality might reasonably be questioned."**

Rule 21-400(A), NMRA 1997 **"A judge is disqualified and shall recuse himself or herself in a proceeding in which the judge's impartiality can reasonably be questioned . . . "**

Rule 21-200, NMRA 1997, **requires a judge to avoid impropriety and the appearance of impropriety**.

Supreme Court Rules of the Code of Judicial Conduct, Rules 63C(1) **" . . . requires disqualification if a judge's impartiality might reasonably be questioned . . .**

South Carolina Sup. Ct., Op. 5-1982 (1982)

SCRA 1986, 21-400(A) (Advance Annotation & Rules Serv. Apr. 1995), which became effective Feb.16, 1995 is applicable and state in pertinent part:

Recusal. A judge is disqualified and shall recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.

National Center for State Courts (NCSC) specifically addresses this matter in "Judicial Ethics, Conduct, and Discipline", under subsection entitled **"When is recusal or disqualification appropriate and what are the procedures for them?":**

"A judge is not disqualified when an ordinary judicial election campaign contributor is a party or lawyer in the matter. The contributions are relevant to the disqualification analysis but are not per se disqualifying. But the judge is disqualified when the judge's campaign coordinator or a campaign committee member is a party or lawyer in a matter"

As we all know, the public places its trust in the judges of this great country. Because judges are the direct reflection of this country's judicial system, they must, at all times, be trustworthy. This requires them to, at all times and at all cost (political or personal), avoid any impropriety. As so prudently stated by the National Center for State Courts, **"It is the appearance of impropriety, even without any connection to the actual impropriety that can be so damaging to the public's trust in our judicial system".**

Thank you for your consideration of this motion.

/s/ Robert H. Lenham
Robert H. Lenham, pro se
Plaintiff/Appellant

IN THE COURT OF APPEAL
OF THE STATE OF NEW MEXICO

Robert H. Lenham

(Plaintiff-Appellant)

Vs.

Disabled American Veterans

(Defendant-Appellee)

Court of Appeals
No. 27,087
Santa Fe County
D0101-CV-96-01606

MOTION FOR RECONSIDERATION OF MOTION TO DISQUALIFY JUDGE MICHAEL E. VIGIL AND TO VACATE HIS PROPOSED SUMMARY DISPOSITION AND MOTION FOR REHEARING

(Filed Oct. 8, 2008)

I, Robert H. Lenham, respectfully request this Court grant this Motion For Reconsideration of Motion To Disqualify Judge Michael Vigil and to Vacate His Proposed Summary Disposition and Motion For Rehearing.

Upon receipt of Judge Michael E. Vigil's Proposed Summary Disposition (PSD), I filed a motion respectfully requesting that this Court disqualify him from presiding over this case and vacating his PSD due to his connection with several of the attorneys of this case.

This court denied the Motion stating that my concerns of impropriety and/or the appearance of impropriety

were 'moot' because the case would be decided by three Judges, not one. I have attached the Motion for your convenience and review (please note that on page 1, paragraph 1 of the Motion, the phrase 'impartiality and/or appearance of impartiality' was a typo and should read 'impropriety and/or appearance of impropriety') and respectfully ask that you reconsider in light of the fact that Judge Vigil and the other 2 Judges affirmed Judge Vigil's PSD..

With all due respect, I resubmit that Judge Vigil, when presiding over a case involving his strongest Judicial advocates, those who solicited thousands and thousand of dollars for him, can not reasonably be perceived as impartial. At the Oral Hearing, the arguments of the opposition consistently referred to Judge Vigil's PSD as a basis for affirmance.

[After consultation with the original panel, the motion is denied. Lynn Pickard Presiding Judge 10-10-08 /s/ LP]

The fact that the other 2 Judges were 'bombarded' with reference and justification of the PSD, (i.e., argument by the opposition in support of Judge Vigil's PSD as well as Judge Vigil's reassertion of his PSD during the Oral Hearing, and ultimately 'recessing for 15 minutes with Judge Vigil' to decide), at the very least, presents the appearance of bias.

The Judges required just 15 minutes to decide that Judge Vigils Proposed Summary Disposition would stand.

I respectfully request a Rehearing before a different panel of Judges who have not been influenced by Judge Vigil's PSD or Judge Vigil, himself.

Also, this Court's argument that the issue of "Enforcement of Settlement" is barred by the doctrine of law of the case conflicts with case law. In **Bessemer Board of Ed. v.. Tucker. Ms. 207D390 (Ala. Civ. App. June 20, 2008)** application of the 'law of the case' doctrine was found not to be 'inflexible'. "The doctrine directs a court's discretion; it does not limit a court's power", **Slip Opinion p. 7.** Also, "On remand, courts are often confronted with issues that were never considered by the remanding court. 'In such cases, 'broadly speaking, mandates require respect for what the higher court decided, not for what it did not decide'. **United States v. Kellington, 217 F.3d 1084, 1093 (9th Cir.2000)**. (quoting **Biggins v. Hazen Paper Co., 111 F.3d 205, 209 (1st Cir. 1997)**.

Significant to note is the fact that the issues deemed appropriate before this Court (sanctions for not agreeing to enforcement of settlement, attorneys fees for enforcement of settlement' for which I did not agree, etc.) exist solely because I did not agree to the enforcement of settlement otherwise, this entire appeal (6 years) would have been moot.

The remaining issues deemed by this Court to be without merit must be heard by an impartial panel. I respectfully request that this court grant these motions and schedule a rehearing at its earliest convenience.

Thank you for your consideration of these Motions.

Respectfully,

/s/ Robert Lenham
Robert Lenham, Pro Se

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

ROBERT LENHAM,

Plaintiff-Appellant,

vs.

DISABLED AMERICAN VETERANS,

Defendant-Appellee,

vs.

J. EDWARD HOLLINGTON & JOHN L. LOESCHEN,

Interested Parties,

and

TIMOTHY L. BUTLER & GARY L. RICHARDSON, RICHARDSON LAW FIRM, PC,

Interested Parties.

No. 27,087
Santa Fe County
D0101-CV-96-01601

ORDER

(Filed Oct. 29, 2007)

This matter having come before the Court on Appellant Robert Lenham's Motion to Disqualify Judge Michael E. Vigil From Presiding Over This Case and Motion to Vacate Judge Michael Vigil's Proposed Summary Disposition of This Case, and it appearing that:

1. This case was assigned to the Expedited Bench Decision program by this Court's order filed October 16, 2007; and

2. This case will be decided by a panel of three judges in accordance with the Expedited Bench Decision program;

NOW, THEREFORE, IT IS ORDERED that this motion is **DENIED** as **MOOT**.

/s/ Michael D. Bustamante
MICHAEL D. BUSTAMANTE,
Judge

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

No. SF 96-1601 (CV)

ROBERT H. LENHAM,

Plaintiff,

vs.

DISABLED AMERICAN VETERANS, et al.

Defendants.

ORDER ON ATTORNEYS FEES AND DISMISSAL OF CASE WITH PREJUDICE

(Filed Aug. 16, 2006)

~~Plaintiff Robert H. Lenham,~~ Defendant Disabled American Veterans and Interested Parties Timothy L. Butler, Esq., and Richardson & Ward, ("Butler & Richardson"), J. Edward Hollington and John Loeschen ("Hollington & Loeschen"), ~~all~~ [who are /s/ DS] former attorneys of Plaintiff Robert H. Lenham, hereby stipulate and agree as follows and, based upon such stipulation and agreement of the Parties, the pleadings, and the facts and circumstances attendant to this matter,

THE COURT HEREBY FINDS:

1. Pursuant to the New Mexico court of Appeals Memorandum Opinion filed on April 5, 2004, the parties submitted their proposed findings of fact and conclusions of law. These

proposed findings and conclusions of the various parties were reviewed by Judge Carol J. Vigil together with the extensive pleadings at her disposal.

2. Judge Vigil, "having reviewed the parties' submitted findings and conclusions, having considered the prior arguments of counsel, having considered the pleadings on file, and otherwise being apprised of the issues" adopted the court's June 8, 2005 Findings of Fact and Conclusions of Law, and entered its Order giving effect to the same on September 21, 2005.

3. Of the settlement amount of $300,000, Plaintiff Lenham was previously awarded and was paid $130,452.60.

4. From the remaining "169,547.40, Judge Vigil's September 21, 2005 Order awarded Defendant disabled American Veterans the sum of $26,700.52 in attorneys fees and costs, and awarded Butler & Richardson the sum of $108, 152 [sic] in attorneys fees and costs and reserved the remaining funds ($34,694.88) to be applied against fees to be awarded Hollington & Loeschen upon application for such fees, with Plaintiff Lenham liable for any additional fees awarded Hollington & Loeschen in excess of these remaining funds.

5. Pursuant to Judge Vigil's Order, Hollington and Loeschen have filed their application for attorneys fees based in quantum meruit, seeking $88,975.74. No party or interested

party has opposed this application for attorneys fees.

6. In lieu of adjudication on the Hollington & Loeschen application for attorneys fees, Defendant DAV and Interested Parties Butler & Richardson and Hollington & Loeschen have agreed to distribute the $169,547.40 in attorneys fees and costs as follows: DAV $26,700.52, Butler & Richardson $92,850.47 and Hollington & Loeschen $49,996.41

7. ~~The Parties agree that this case shall be dismissed with prejudice.~~ [Plaintiff continues to object to and oppose this agreement /s/ DS]

WHEREFORE, IT IS HEREBY ORDERED THAT:

Defendant DAV shall distribute the $169,547.40 remaining in its Trust Account pertinent to this action, as an award of attorneys fees and costs in this matter as follows: DAV $26,700.52, Butler & Richardson $92,850.47 and Hollington & Loeschen $49,996.41.

It is FURTHER ORDERED that this case shall be and is hereby dismissed with prejudice.

/s/ Daniel Sanchez
District Court Judge

~~**STIPULATED AND AGREED TO:**~~

_____

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

ROBERT H. LENHAM

Plaintiff,

vs.

No. SF 96-1601(C)

DISABLED AMERICAN VETERANS,

Defendant.

ORDER AND JUDGMENT FOR DEFENDANT DAV ON THE COURT'S AWARD OF SANCTIONS AGAINST PLAINTIFF ROBERT H. LENHAM

(ENDORSED Sep. 21, 2005)

THIS MATTER came before the Court on remand from a Memorandum Opinion filed on April 5, 2004 by the New Mexico Court of Appeals. The Court, having reviewed the parties' submitted findings and conclusions, having considered the prior arguments of counsel, having considered the pleadings on file, and otherwise being fully apprised of the issues, hereby **FINDS, ORDERS, ADJUDGES AND DECREES** that:

1. The Court's Findings of Fact and Conclusions of Law, filed on June 8, 2005, are hereby adopted by the Court; and

2. Pursuant to the Court's June 8, 2005 Findings of Fact and Conclusions of Law, the Court hereby

awards the DAV costs and fees in the amount of $26,700.52, and Butler/Richardson $108,152 (lien amount of $142,000 less $33,848 fees paid by Lenham to Butler/Richardson) to be paid from the remaining settlement funds in this case. Any settlement funds remaining shall be paid into the Court's registry pending cost and fee application by Messrs. Loeschen and Hollington and shall be applied against any such award by this Court, with any further remainder to be paid to Mr. Lenham.

/s/ ORIGINAL SIGNED BY
JUDGE CAROL J. VIGIL
THE HONORABLE
CAROL J. VIGIL
District Court Judge

Submitted:

MADISON, HARBOUR, MROZ
& BRENNAN, P.A.

/s/ Rebecca Kenny for
William C. Madison, Esq.
Michael J. Dekleva, Esq.
P.O. Box 25467
Albuquerque, NM 87125-5467
(505) 242-2177

Attorneys for Disabled
American Veterans

APPROVED AS TO FORM:

Joseph P. Kennedy, Esq.
1000 2nd Street, NW
Albuquerque, NM 87102
Attorney for Plaintiff

Via Telephonic Approval of 6/17/05
Timothy L. Butler, Esq.
125 Lincoln Avenue, Suite 400
Santa Fe, NM 87501
Interested Party